COLUMBIA LAW REVIEW.

VOL. VII. MAY, 1907 No. 5

TAXATION OF MOVABLES AND THE FOURTEENTH AMENDMENT.

The great diversification in modern times of the functions of government, concurrently with the development of a more and more complex social and industrial life, has necessarily been attended with a constant increase of public expenditures. How to meet these increased expenditures is one of the most difficult problems with which statesmen have to deal; for not only is opposition encountered when new sources of revenue are sought, but, owing to changes in the relative importance of different forms of property, old rules, which were accepted as unquestionable and were supposed to be simple in application and easy of execution, are in time found to work results which even the courts feel justified in essaying to remedy.

Of this gradual transformation of the law we have lately had a striking example. The vastly disproportionate increase in the value of personal property as compared with that of real property is one of the commonplaces of modern finance, and it is not strange that, upon the strength of this fact, strenuous efforts have been made to extend and augment the taxes upon personalty not only as a means of raising revenue but also as a means of relieving the burdens upon realty.

In levying taxes upon personal property two rules were supposed to be applicable. In order that property may be taxed it must be within the jurisdiction of the taxing power, and with regard to personalty this condition of subjection was conceived to exist when the property had either an actual situs or a legal situs within the jurisdiction. The property had an actual situs when it was physically present; it had a legal situs when, although it was physically absent, the owner was domiciled within the jurisdiction. The latter rule was deduced from the theory that

personal movables, in contemplation of law, follow the person of the owner, or, in the usual Latin formula, *mobilia personam sequuntur*.

That this theory was, without regard to the question of its logical justification or continuity, accepted as an established principle of law can hardly be doubted. "If," says Cooley, "a person is domiciled within the State, his personalty, in contemplation of law, has its situs there also, and he may be taxed in respect of it at the place of his domicil."[1] Another writer, eminent as an authority upon the theory as well as upon the practice of taxation, stated in an essay written only ten years ago, that, while most of the States of the United States taxed personal property actually located within their bounds, yet in many places the legal principle *mobilia personam sequuntur* prevailed, with the result that a non-resident's personalty would be taxed twice; that some of the States had indeed by statute exempted "a resident's personalty if permanently located and taxed in another State," but that "in most of the commonwealths the legal fiction still prevails, and the individual is taxed on all his personalty irrespective of its location."[2] Lastly, the Supreme Court of the United States, as recently as 1886, observed that, if the owner of personal property situated in one State resided in another State which taxed him on the property "as part of his general estate attached to his person," this would not affect the right of the State in which the property was situated to tax it also.[3] In this case the point at issue was the right to tax the property at the place of its actual situs, and it was held to be so taxable, but the court seems to have assumed that the principle *mobilia personam sequuntur* might at the same time be invoked and enforced.

An illustration of the view formerly prevalent may be seen in a case in Massachusetts, in 1867, in which a petition was filed for a writ of certiorari to quash the proceedings of the authorities of Boston in refusing to abate a tax assessed on one of the petitioners, who were partners in trade, having their principal place of business in St. Louis, where one of them resided. The other partner lived in Boston, where they hired and used a warehouse for the storage of goods sent thither for sale. On these goods they admitted that they were taxable, but they resisted the attempt to tax in Boston

---

[1] Cooley on Taxation (1903), 86.

[2] Seligman's Essays on Taxation (1895), 112, 113.

[3] Coe *v.* Errol, 116 U. S. 517. 524; cited in Judson on Taxation (1903), 501.

the interest of the partner there resident in the partnership property outside of Massachusetts. The Supreme Judicial Court of that commonwealth, speaking through Gray, J., declared that it was "clearly of opinion that the partner residing in Boston was taxable here on this interest, by the express provisions of the eleventh chapter of the General Statutes." By that chapter "all personal estate, within or without" the State, was assessable in the city or town of which the owner was an inhabitant, and "personal estate" was declared to include, for the purposes of taxation, "goods, chattels, money and effects, * * * within or without the State." "The fact," said the court, "that the same interest is or may be taxed in another State will not justify the court in disregarding the positive directions of our own legislature." The petition was accordingly dismissed.[1]

Meanwhile, a tendency was visible, in judicial decisions as well as in legislation, to enlarge the conception of the actual situs of tangible movables, so as to expand the power of taxation on that ground. This tendency was strongly manifested in the case of *Pullman's Palace Car Company* v. *Pennsylvania*, before the Supreme Court of the United States, in 1888.[2] In this case an action was brought by the State of Pennsylvania against Pullman's Palace Car Company, an Illinois corporation, to recover a tax on its capital stock, taking as the basis such proportion of the capital stock as the number of miles of railroad over which cars were run by the company in Pennsylvania bore to the whole number of miles everywhere over which its cars were run. It was found as a fact that "the cars used in the State of Pennsylvania were also used in other States, their use in Pennsylvania being confined to passengers to or from points in other States." The court in which the suit was brought held that "the proportion of the capital stock of the defendant invested and used in Pennsylvania" was taxable under the State statutes, and that the amount of the tax might be ascertained by taking as a basis "the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question whether any particular car or cars were used." This decision the supreme court of Pennsylvania affirmed, holding that the fact that the cars were also operated in other States could not wholly exempt them from taxation in that State.[3] In the Supreme Court

---

[1] Bemis *v.* Boston (1867), 96 Mass. 366.
[2] 141 U. S. 18.
[3] 107 Pa. State, 156, 160.

of the United States, the decision was rendered by Mr. Justice Gray. The question, he said, was whether the tax violated the clause of the Constitution granting to Congress the power to regulate commerce among the several States. In holding that the tax did not have this effect, he laid down the following propositions: 1. That the legislative power of a State extends to all property within its borders. 2. That the old rule of *mobilia personam sequuntur* had yielded more and more to the law of *situs*, so that for purposes of taxation personal property might be separated from the owner. 3. That a State was not prevented from taxing personal property because it was employed in interstate or foreign commerce. 4. That, while ships or vessels engaged in interstate or foreign commerce and registered under the laws of the United States at their owner's domicil were not subject to taxation in other States at whose ports they incidentally touch, yet the case of cars, having no fixed situs, was obviously different. 5. That the company had at all times substantially the same number of cars within the State, namely, about one hundred. 6. That the assessment, on the basis of car mileage, was equitable, so that, if it was generally adopted, the company would be assessed on the whole value of its capital stock, and no more.[1]

In the foregoing case it was obviously not decided that tangible movables, either temporarily or permanently outside the State of the owner's domicil, were not taxable in such State, but, in extending the conception of actual situs, the decision tended to weaken the claims of domiciliary situs, and, by increasing the liability to double taxation, to render more general the existence of conditions requiring remedial action. Was there anything in the constitutional law of the United States, affecting the powers of the States, which would enable the Federal courts to afford a remedy?

Fifteen years later, in 1903, the Supreme Court invoked the provision of the Fourteenth Amendment, forbidding any State to "deprive any person of life, liberty, or property, without due process of law," as a bar to the imposition by one State of taxes on realty in another. I say on realty, because the property in question was an incorporeal hereditament which was considered

[1] Mr. Justice Bradley, with whom concurred Justices Field and Harlan, dissented on the ground that one State cannot tax the capital stock, as such, of the corporation of another State.

That vessels, having an actual situs in a certain State, may, although they are used in connection with interstate commerce, be taxed there, see Old Dominion Steamship Company *v.* Virginia (1905), 198 U. S. 299.

as realty by the law of the State under which it was granted. The facts in the case were that the State of Kentucky, in assessing for taxation the franchise of one of its corporations, sought to include in the valuation thereof the value of certain franchises which the State of Indiana had granted for a ferry across the Ohio River from the Indiana to the Kentucky shore, and which the Kentucky corporation had purchased. The Supreme Court of the United States, Mr. Justice Harlan delivering the opinion, held that the Indiana franchise constituted an incorporeal hereditament having its situs in that State, and that the attempt of Kentucky to tax it was an attempt to deprive the company of its property without due process of law.[1]

Two years later, in 1905, the same bar was interposed to the taxation by a State of movable property belonging to one of its corporations but having a permanent situs outside of its limits.[2] A quantity of coal, of the approximate value of two million dollars, mined in Pennsylvania and belonging to the Delaware, Lackawanna and Western Railroad Company, a Pennsylvania corporation, had been transported to other States, where it was awaiting sale. While it was in this situation the authorities of Pennsylvania included it in a valuation of the company's capital stock for purposes of taxation. The company contended that it should be excluded, on the ground that it had a permanent situs outside the State. Counsel for Pennsylvania conceded that, under the law of that State, property having such a situs could not be taxed, but contended that the coal, when mined, entered into the value of the capital stock, and that this enhanced value remained and formed a proper subject of taxation. Mr. Justice Peckham, delivering the opinion of the Supreme Court, said that coal, lying in other States for purposes of sale, was subject to taxation there, without regard to the question where the proceeds might go when the sale was effected;[3] and that if a State could not tax tangible property permanently outside its borders, it could not attain the same end by taxing the enhanced value of the stock arising out of the value of the foreign property. Could relief be afforded under the provisions of the Federal Constitution? He answered in the affirmative, on the strength of the doctrine laid down in *Louisville and Jeffersonville Ferry Co.* v. *Kentucky*. The

[1] Louisville and Jeffersonville Ferry Company *v.* Kentucky (1903), 188 U. S. 385.

[2] Delaware, Lackawanna and Western Railroad Company *v.* Pennsylvania (1905), 198 U. S. 341.

[3] Citing Brown *v.* Houston (1885), 114 U. S. 622.

coal, he declared, was as much outside the jurisdiction of Pennsylvania for purposes of taxation as was the Indiana ferry franchise outside the jurisdiction of Kentucky. The Chief Justice dissented, without filing an opinion. The authority of the case, as affecting the power to tax foreign movables, is qualified by the admission made by counsel for Pennsylvania, that the statute under which the tax was levied did not authorize the taxation of such property.

No such qualification existed in the case of *Union Refrigerator Transit Company* v. *Kentucky*,[1] which was soon afterward decided, in 1905. The plaintiff in error in this case was a Kentucky corporation, owning two thousand cars which were rented to shippers, who took possession of them from time to time at Milwaukee, in Wisconsin, and used them for the carriage of freight in the United States, Canada and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines. Kentucky sought to tax the company on all its cars, the laws of the State authorizing the taxing of its corporations on all their movable property within or outside the State. Counsel for the company admitted that it was impossible to ascertain how many of the cars, which were constantly moving, were in any State on any named day, and that the State had the right to devise a fair method of ascertaining the average number, without regard to particular cars, and to tax such number, but they challenged the claim to tax all the cars, on the ground that it involved the denial of due process of law. The Supreme Court, Mr. Justice Brown delivering the opinion, sustained this contention upon the following grounds: 1. That "the power of taxation" is "exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children," and that "if the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax." 2. That, while absolute uniformity is unattainable, it is "essential to the validity of a tax that the property

[1] 199 U. S. 194.

shall be within the territorial jurisdiction of the taxing power," since "not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which it wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation." 3. That "the argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction," since "it is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws." The court therefore held that "the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that commonwealth."

The decision of the court was not unanimous. Mr. Justice White concurred in the result, but Mr. Justice Holmes said: "It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed."

The opinion of the court contains this statement: "There are two recent cases in this court which we think completely cover the question under consideration and require the reversal of the State court." The cases thus referred to were those of *Louisville and Jeffersonville Ferry Co.* v. *Kentucky*, and *Delaware, Lackawanna and Western Railroad Co.* v. *Pennsylvania.* The court evidently meant that these cases covered the pending case in principle, for, as we have seen, the circumstances of the two earlier cases were such that the question of the power to tax foreign tangible movables was not necessarily passed upon.

The court did not omit respectfully to inter the rule *mobilia personam sequuntur*, so far as it relates to tangible property. There doubtless were, said the court, cases in the State reports announcing that this "ancient maxim" "still" applied to "personal property," but upon examination "all or nearly all" would be found to relate to "intangible property, such as stocks, bonds, notes and other choses in action." In this relation the court cited *Hoyt* v. *Commissioners of Taxes*,[1] as "one of the most valuable of the State cases" upon the point "that the tangible property of a resident actually situated in another State or country was not to be included in the assessment against him." The decision, however, involved

[1] (1861), 23 N. Y. 224.

nothing more than the construction of a New York statute, which provided for the taxation of "all lands and all personal estate within this State." The Court of Appeals held that this phrase included only property having an actual situs in New York. Chief Justice Comstock, in delivering the opinion of the court, observed that, although it was conceded that lands lying outside the State could not be taxed, yet it was claimed that goods and chattels could be, but he added: "The legislature I suppose could make this distinction, but that they have not made it in the language of the statute is perfectly clear." On the proposition, therefore, that tangible property can lawfully have but one situs for purposes of taxation, *Hoyt* v. *Commissioners of Taxes* can hardly be accepted as a direct authority.

In *Union Refrigerator Transit Company* v. *Kentucky* the principle was assumed that property can be taxed only by the government that protects it. This was indeed the very foundation of the appeal to the Fourteenth Amendment. But it is evident that if this principle should be carried to its logical conclusion the results would be far reaching. The court expressly confined its decision to tangible property. "There is," declared the opinion, "an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs, except perhaps in the case of mortgages or shares of stock." The exception here suggested is as palpable as it is important. A citizen of New York, let us suppose, owns shares of stock in a foreign corporation which owns and operates a railway in another State. The value of the shares consists in the right of way, the tracks and the rolling stock. The property is tangible in the fullest sense. It receives no protection whatever from the State of New York; nor does the owner of the shares receive in respect of his certificate any protection other than he would enjoy in respect of a bill of sale of a stock of merchandise in New Orleans, such as was under consideration in the case of *Hoyt* v. *Commissioners of Taxes.* If the question is to be determined on principle, the Fourteenth Amendment, if it precludes the taxation of the one in New York, seems equally to preclude the taxation of the other.

The question of taxing shares of stock in a corporation owning and using tangible property is presented in an interesting form in a recent decision of the New York Court of Appeals.[1] A resident

[1] In re Cooley's Estate (1906), 78 Ne., 939.

of Connecticut died, leaving, as part of his estate, a considerable number of shares of stock of the Boston and Albany Railroad Company. This company was a consolidation formed by the merger of certain New York corporations and a Massachusetts corporation. The merger was authorized, and the consolidated corporation separately created, practically in duplicate, under the laws of each State, but there was only one issue of stock, representing all the property of the consolidation. Of the mileage of the road, however, only one-sixth was in New York. Nevertheless, the authorities of that State sought to tax the shares in question for purposes of inheritance, at their full value, under a law imposing such a tax "when the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death."[1] The court of appeals, after citing certain definitions of a shareholder's interest in the capital stock of a corporation, held that, as the shares in question "represented a certain interest in the surplus of assets over liabilities of the Boston and Albany Railroad Company," their value was to be determined, for taxation under the law above quoted, by reference to the amount of property which the company, as incorporated in New York, was to be regarded "as owning for the purposes of this proceeding;" and that, in this sense, the New York corporation was to be regarded as holding the property situated in New York and the Massachusetts corporation the property in Massachusetts, and each as owning a share of any property situated outside either State or moving to and fro between the two States.

That the principle laid down in *Union Refrigerator Transit Company* v. *Kentucky*, will not in all cases be carried by the Supreme Court to its logical conclusion is indicated by the subsequent decision in *New York Central Railroad* v. *Miller*,[2] in which Mr. Justice Holmes, delivering the opinion of the court, gave effect, to a certain extent, to the doubt which he expressed as to the correctness of the judgment in the Kentucky case. The New York case was one of a franchise tax, imposed under a law[3] requiring every corporation created by the State to pay a tax to be computed "upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount."

---

[1] New York Laws, 1896, c. 908, §220, as amended by Laws of 1897, c. 284, §2.

[2] (1906) 202 U. S. 584.

[3] New York Laws, 1896, c. 908, §182.

It was admitted by Mr. Justice Holmes that the New York Central Railroad Company was a "corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own;" that the cars "often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their independent business, before they return to the relator or the State;" that, "in short, by the familiar course of railroad business, a considerable proportion of the relator's cars is constantly out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State." But no evidence was offered by the company to show that any of its cars or engines "were used continuously and exclusively outside of the State during the whole tax year," although "evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned," and the company's car mileage within and outside the State.

On the facts as thus stated it was held that the company was taxable in New York on all its cars, and that no deduction, on account of cars constantly employed out of the State, could be made from its entire capital, in order to ascertain the capital stock employed within the State. In announcing this conclusion Mr. Justice Holmes declared that it had never been decided and could not be decided that "a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back," and that, "using the language of domicil * * *, the State of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts."

With regard to this decision it is to be observed, in the first place, that it cannot be considered as directly conflicting with the judgment in *Union Refrigerator Transit Company* v. *Kentucky*, since in the latter case the tax was imposed directly on the property, while in the New York case it was imposed on the franchise. Besides, in the Kentucky case, the most of the cars were in reality employed wholly outside the State. But these distinctions do not exist in respect of *Pullman's Palace Car Co.* v. *Pennsylvania*. In this case, says Mr. Justice Holmes, "the same cars were con-

tinuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them." The tax, however, was not laid upon the cars. It is true that the same cars were in fact continuously used, but they were used in other States as well as in Pennsylvania; and the tax was levied, not upon the cars, but upon such proportion of the capital stock of the company as the number of miles of railroad over which its cars were run in Pennsylvania bore to the entire aggregate of its mileage everywhere. It is, therefore, not strange that the Pennsylvania courts expressly declared that the tax was levied "without regard to the question whether any particular car or cars were used." Nor is the circumstance to be overlooked that in *Louisville and Jeffersonville Ferry Company* v. *Kentucky* the point expressly and necessarily decided was that property which cannot be directly taxed because of its foreign situs, cannot be indirectly reached by means of a tax on the franchise. The same principle was enforced in *Delaware, Lackawanna and Western Railroad* v. *Pennsylvania.*

While, therefore, it cannot be said that the decision in *New York Central Railroad* v. *Miller* in express terms conflicts with the previous decisions of the Supreme Court, yet, tested by principle, it disappoints the expectation, which those decisions had raised, that the Fourteenth Amendment would be consistently applied so as to prevent the double taxation of tangible movables. Its inconsistency in theory with previous decisions can be fully appreciated only when we bring into contrast the ruling in *American Refrigerator Transit Company* v. *Hall,*[1] in 1899, and *Union Refrigerator Transit Company* v. *Lynch,*[2] in 1900. In the former case the State of Colorado taxed the cars of an Illinois corporation, none of which was continuously used in the former State. The tax was not imposed on any particular cars, nor could it have been so levied, since all were used in interstate commerce, but it was imposed on the average number of cars used in Colorado, this proportion of the company's car property being separated from the mass and localized for purposes of taxation. This proportion the court described as "property situated within the State," even though "the specific and individual items [cars] * * * were not continuously the same, but were constantly changing." It was, as the court said, a question not of specific property but of "the average amount of the property habitually used" in the

[1] 174 U. S. 70.
[2] 177 U. S. 149.

State. A precisely similar ruling was made in *Union Refrigerator Transit Company* v. *Lynch*, in respect of a similar tax levied by the State of Utah on the company's car-property in that State.

There seems to be a certain want of congruity in holding that moving cars, engaged in interstate commerce, may, on the one hand, be localized collectively as car-property for the purpose of taxing a proportion of them in one State, but may, on the other hand, be considered as having each an individual domicil for the purpose of taxing all of them in another State. If the former view, as definitely established by the two decisions in 1899 and 1900, be correct, it is obvious that, in a case such as that of *New York Central Railroad* v. *Miller*, a proportion of the cars is as completely and permanently outside the physical limits of the home State of the owner as was the proportion of cars held not to be subject to taxation in *Union Refrigerator Transit Company* v. *Kentucky*. For, in the latter case, although most of the cars were used outside Kentucky, they were not specifically and finally separated from the rest for foreign use, and they were held to be exempt from taxation in Kentucky only because the court rejected the maxim *mobilia personam sequuntur*, which has, however, been reinstated in the precise terms of the law of domicil, in the case of the cars of the New York Central Railroad.

I have not overlooked the fact that Mr. Justice Holmes in the course of his opinion stated that it did not appear "that any specific cars or any average of cars was so continuously in any other State as to be taxable there," and that "the absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of the other roads." With reference to this statement two observations may be made: First, that the learned justice of course did not intend to intimate that a taxable situs would have been communicated to the cars in other States merely by taxing them there; and secondly, that every word of the statement might have been applied to the cars in the Colorado and Utah cases, if those States had not seen fit to undertake the arithmetical computation of the average amount of car-property in the State during the year. In an agreed statement of facts in the Colorado case it was explicitly set forth that the cars were furnished "to be run indiscriminately over any lines of railroad over which shippers on said railroad desire to route them in shipping"; that they were neither leased nor "allotted" to any company within Colorado; that they "never

were run in said State in fixed numbers nor at regular times, nor were any certain cars ever in the said State," except "transiently" and when engaged in interstate commerce. The cars were simply localized collectively, and, being so localized, were held to be taxable, as tangible property, at the actual situs.

JOHN BASSETT MOORE.

NEW YORK.